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9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11

12 MIGUEL ORTEGA, BENJAMIN ORTEGA, A  
Minor, By and through his Guardian Ad  
13 Litem, ANA ROSA ORTEGA,

14 Plaintiffs,

15 v.

16 CITY OF OAKLAND, OAKLAND POLICE  
DEPARTMENT, WAYNE TUCKER, In His  
17 Capacity as the Police Chief of the City of  
Oakland, RAMON J. ALCANTAR,  
18 Individually and in his capacity as a Police  
Officer for the City of Oakland, DOES 1  
19 THROUGH 200,

20 Defendants.  
21

Case No. C07-02659 JCS

**DEFENDANT CITY OF OAKLAND AND  
OAKLAND POLICE DEPARTMENT'S  
NOTICE OF MOTION AND MOTION TO  
DISMISS FOR FAILURE TO STATE A  
CLAIM PURSUANT TO FRCP 12(b)(6)**

**DATE: AUGUST 10, 2007**

**TIME: 9:30 A.M.**

**COURTROOM: A - 15<sup>TH</sup> FL.**

**The Honorable Joseph C. Spero**

22  
23 **NOTICE OF MOTION**

24 Please take notice that on Friday, August 10, 2007 at 9:30 a.m., or as soon thereafter  
25 as the matter may be heard in Courtroom A, 15<sup>th</sup> floor of the above-entitled court, located at  
26 450 Golden Gate Avenue, San Francisco, CA. Defendants CITY OF OAKLAND and

1 OAKLAND POLICE DEPARTMENT will move the court to dismiss the Second and Tenth  
2 Causes of Action in Plaintiffs' complaint for failure to state a claim upon which relief can be  
3 granted. This motion is brought under Federal Rule of Civil Procedure §12(b)(6) as the  
4 specified causes of action fail to state viable causes of action against defendants City of  
5 Oakland and Oakland Police Department.

6  
7 **I. INTRODUCTION**

8 Plaintiffs Benjamin Ortega and Miguel Ortega ("Plaintiffs") filed this action against  
9 Defendants City of Oakland ("City"), the Oakland Police Department, Police Chief Wayne  
10 Tucker, and Police Officer Ramon J. Alcantar ("Alcantar"), alleging federal Constitutional  
11 violations, violations of Civil Code §§ 51.7 and 52.1, and various common-law tort claims<sup>1</sup>.  
12 Plaintiffs' claims arise out of an incident with defendant Officer Alcantar and another  
13 unnamed police officer.  
14

15 **II. STATEMENT OF FACTS**

16 On May 7, 2006, Plaintiffs Benjamin Ortega and Miguel Ortega were returning to  
17 their relative's home in Oakland. Benjamin Ortega ignored an order to disperse from  
18 Officer Alcantar and a verbal altercation ensued. Miguel Ortega joined the altercation,  
19 which resulted in Plaintiffs being detained and released. (Defendants have not yet had an  
20 adequate opportunity to gather facts in order to more fully explain the circumstances of  
21 plaintiffs' detention.)  
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26 <sup>1</sup> This motion is only brought by defendants City of Oakland and Oakland Police Department. Defendants Police Chief Wayne Tucker and Officer Ramon Alcantar have not been served.

### 1 III. DISCUSSION

#### 2 A. **PLAINTIFFS' TENTH CAUSE OF ACTION MUST BE DISMISSED FOR FAILING** 3 **TO ESTABLISH A STATUTORY BASIS FOR CITY LIABILITY**

4 In their Tenth Cause of Action, plaintiffs assert a tort claim against the City of  
5 Oakland but fail to set forth the statutory basis for liability against the City. Accordingly,  
6 this claim should be dismissed.

7 A public entity is not liable for an injury, whether such injury arises out of an act or  
8 omission of the public entity or a public employee or any other person. (Cal. Gov. Code  
9 §815(a), Brenneman v. State of California, 208 Cal.App.3d 812, 817 (1989)(plaintiff must  
10 specifically allege the enactment that gives rise to a statutory duty).) In California, all  
11 government tort liability is based on statute. (Creason v. Department of Health Services,  
12 19 Cal.4<sup>th</sup> 925, 932 (1998), Hoff v. Vacaville Unified School Dist., 19 Cal. 4th 925, 932  
13 (1998).) A general tort statute is insufficient by itself to serve as a basis for direct public  
14 liability. (Eastburn v. Regl. Fire Protec. Auth., 31 Cal. 4th 1175, 1183 (2003).)  
15

16 Plaintiffs' Tenth Cause of Action arises under the common-law doctrine of  
17 respondeat superior. The City is immune from common-law liability under California  
18 Government Code §815, except for those instances where a statute confers liability to the  
19 City. Plaintiffs have not alleged a statutory basis for liability in their Tenth Cause of  
20 Action. Therefore, this cause of action should be dismissed for failure to state a statutory  
21 basis for liability and therefore failing to state a claim upon which relief can be granted  
22 against defendants City of Oakland and the Oakland Police Department.  
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**B. PLAINTIFFS' MONELL CLAIM MUST BE DISMISSED FOR FAILING TO ADEQUATELY PLEAD FACTS ESTABLISHING A PATTERN AND PRACTICE OF CONSTITUTIONAL VIOLATIONS BY DEFENDANTS**

Plaintiffs' Second Cause of Action asserts a Monell claim, alleging a pattern and practice of Constitutional violations by defendant Officer Alcantar and other police officers. The Monell claim further alleges deliberate indifference to this pattern and practice of constitutional violations on the part of the City and defendant Police Chief Tucker, and further alleges that there exists an informal custom or policy of continued use of excessive force. Plaintiffs fail to offer any facts to support their allegations. The absence of specific facts fails to give defendants adequate notice of the grounds upon which the claim rests. Accordingly, plaintiffs' Second Cause of Action should be dismissed.

As the United States Supreme Court recently ruled in Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (Bell Atlantic Corp. v. Twombly, supra, 127 S. Ct. at 1964-65.)<sup>2</sup> The Bell plaintiffs' allegations of parallel conduct was insufficient to withstand a Rule 12(b)(6) motion because their complaint lacked "enough *factual* matter" to suggest that the defendant in the case had acted out of conspiracy to restrain trade, rather than as a result of typical business strategy. *Id.* at 1965, 1971-73 (emphasis added).

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<sup>2</sup> The U.S. District Court of Northern California has promptly employed the *Bell* holding. In re *Netflix Antitrust Litigation*, 2007 WL 1725422 (N.D. Cal. 6/14/07)(elements of a cause of action will not find support from factually neutral allegations; when business entity conduct is equally understood to be the product of independent market forces as it is of culpable motivations, such conduct will not support an antitrust claim).

1 Plaintiffs allege defendant Officer Alcantar and others falsely arrested plaintiffs and  
2 subjected them to unnecessary and excessive force. The plaintiffs then conclude these  
3 alleged Constitutional violations are the proximate cause of a City policy that tacitly  
4 encourages violations of their citizenry's civil rights; a policy manifested by the City's 1)  
5 deliberate indifference to and failure to remedy, 2) an ongoing pattern of Constitutional  
6 violations perpetrated by Alcantar and Does 1-100, which 3) the City has been given  
7 notice of. (Complaint at ¶ 24 & 25, pps. 6 & 7.)

9 These are not factual allegations. These allegations are nothing more than, as the  
10 Bell court said, "labels and conclusions" commonly referred to in Monell claims. Plaintiffs  
11 have failed to supply any factual allegations suggesting a history of ongoing Constitutional  
12 violations perpetrated by defendant Officer Alcantar and Does 1-100, and have also  
13 omitted how the City became aware of such violations. Plaintiffs use conclusory language  
14 that the City acted with indifference. These formulaic allegations, wholly lacking any  
15 factual support, do not satisfy the more rigorous pleading standards announced in Bell  
16 Atlantic v. Twombly, supra, 127 S.Ct. 1955. Mere recitations of the elements of a cause  
17 of action, without more, are legally insufficient to adequately plead a cause of action.  
18 Accordingly, plaintiffs' Second Cause of Action should be dismissed for failing to state a  
19 claim upon which relief can be granted against the City of Oakland.

#### 22 IV. CONCLUSION

23 For the reasons set forth above, defendants' Motion to Dismiss must be granted.  
24 Plaintiffs' Tenth Cause of Action fails to establish a statutory basis that would subject the  
25 City to liability. Plaintiffs' Second Cause of Action fails to adequately plead facts in  
26

1 support of a Monell claim. Accordingly, plaintiffs' Second and Tenth Causes of Action  
2 must be dismissed.  
3

4 DATED: JUNE 27, 2007  
5

6 JOHN A. RUSSO, City Attorney  
7 RANDOLPH W. HALL, Assistant City Attorney  
8 JAMES F. HODGKINS, Supervising Trial Attorney  
9 CHARLES E. VOSE, Senior Deputy City Attorney

10 By: \_\_\_\_\_ / S /  
11 Attorneys for Defendants  
12 CITY OF OAKLAND and OAKLAND POLICE  
13 DEPARTMENT  
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**PROOF OF SERVICE**

**ORTEGA, ET AL., v. CITY OF OAKLAND, ET AL..**

**United States District Court Case No. C07-02659 JCS**

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is City Hall, One Frank Ogawa Plaza, 6th Fl., Oakland, CA 94612. On the date set forth below I served the within documents:

**DEFENDANT CITY OF OAKLAND AND OAKLAND POLICE DEPARTMENT'S NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO FRCP 12(b)(6)**

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.

☒ **by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth.**

by causing personal delivery by (name) of the document(s) listed above to the person(s) at the address(es) set forth below.

by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

by causing such envelope to be sent by Federal Express/ Express Mail.

STEVEN R. JACOBSEN, ESQ.  
CATHERINE R. DOUAT, ESQ.  
LAW OFFICES OF STEVEN JACOBSEN  
901 CLAY STREET  
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TELEPHONE: (510) 465-1500  
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I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of American/State of California that the above is true and correct.

Executed on JUNE 27, 2007, at Oakland, California.

\_\_\_\_\_  
/s/  
CRYSTAL ROZA